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NO. 88-921

In The

Supreme Court of the United States

October Term, 1987

WILLIAM F. NETSKY, AS EXECUTOR OF THE ESTATE OF FRANK W. NETSKY, DECEASED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Memorandum for the United States In Opposition filed herein on January 10, 1989 ignores every one of the nine decisions of this Court on §1252 cited in the taxpayer's petition, except that the Government's sole and entire opposition to the taxpayer's petition is predicated upon an erroneous

interpretation of United States v. Christian Echoes National Ministry, 404 U.S. 561 (1972), as applied to a distorted statement of the District Court's decision and order herein.

1. The controlling principle applicable to a determination herein, as to whether the District Court's decision amounts to the "holding" of a provision of an Act of Congress unconstitutional within the meaning of §1252, is to be found in United States v. Locke, 471 U.S. 84 (1985), and here the district court's holding of unconstitutionality of §641 of the Deficit Reduction Act of 1984 ("DEFRA") is indisputably one of several grounds of the District Court's decision.

This Court's decisions other than Locke and Christian Echoes on §1252 cited in the petition, viz., Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985); Heckler

v. Edwards, 465 U.S. 870 (1984); Donovan v. Richland County Association for Retarded Citizens, 454 U.S. 389 (1982); California v. Grace Brethern Church, 457 U.S. 393 (1982); McLucas v. DeChamplain, 421 U.S. 21 (1975); United States v. Christian Echoes National Ministry, 404 U.S. 561 (1972); and Fleming v. Rhodes, 331 U.S. 100 (1947) establish the guide-lines for determining the presence of the four elements of §1252. They collectively establish the rejection of any approach thereto based on mere "semantic niceties", which was the erroneous approach used by the Court of Appeals herein. The Government's Memorandum does not discuss a single one of these cases except for Christian Echoes, and the absence of such discussion speaks volumes.

2. Nor is the Government's attempt to draw a parallel between the

instant case and Christian Echoes valid in any way. The Government argues that "[s]imilarly here, the district court's holding rested on a construction of the statute that it viewed as avoiding constitutional difficulties"[1/] (Gov. Memo. at 6), and implies (despite the fact that the District Court devoted 90 percent of its opinion to declaring §641 of the DEFRA unconstitutional as retroactively applied to the taxpayer's refund claim) that the District Court herein did nothing more than hold that Congress did not intend that §641 of the DEFRA should be retroactively applied. However, the District Court herein did not interpret the Act of Congress in question to "avoid" any constitutional difficulty. The District Court herein decided the

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1/ Emphasis supplied to all quotations unless otherwise noted.

constitutional issue framed by the Government, and decided the issue adversely to the Government.

Further, the Government distorts Christian Echoes, because this Court's opinion clearly states that whatever constitutional issue existed resulted simply from the interpretation given to §501(c)(3) of the 1954 Internal Revenue Code by the Internal Revenue Service -- an administrative agency -- and the Service's manner of enforcement, and that the district court in Christian Echoes did not consider the constitutionality of the Act there in question. The Court said:

> The "basis" of the District Court's decision, United States v. Raines, 362 U.S. 17, 20, 80 S.Ct. 519, 522, 4 L.Ed. 2d 524, was that under the facts adduced at trial, the appellee qualified for exempt status under §501(c)(3). The court did not question or even consider the constitutionality of §501(c)(3) "as a whole".

> Nor does any part of its opinion hold that the section was unconstitutional "as applied". Indeed, the court in this case could hardly have found the appellee to be qualified for an exemption under §501(c)(3), only to hold that the section could not be validly applied in the first place.

404 U.S. at 463-464.

While, as this Court noted in the above quotation from Christian Echoes, this Court said that the district court therein did not consider the constitutional issue and construed the Act to avoid deciding the constitutional issue, in the instant case -- on the contrary -- the District Court held, in part, that §641 of the DEFRA, retroactively applied, was unconstitutional, and the District Court devoted almost all of its opinion to the reasons why it had found and decided the unconstitutionality of the Act.

As to any claim that the District Court's constitutional decision herein might be obiter dicta, not only is such a claim based on a "semantic nicety", but the Government ignores the stated basis of the Court of Appeals' decision, namely, that "the district court's due process discussion did not rise to the level of an alternative holding" (A13). And the Court of Appeals itself said:

> Netsky argues that the district court's ensuing discussion of the constitutionality of retroactive application of section 641 is an alternative holding. If so, direct appeal to the Supreme Court would have been proper. See, United States v. Locke, 471 U.S. 84 (1985); United States v. Rock Royal Cooperative, 307 U.S. 533 (1939).

The Court of Appeals further observed with respect to the District Court's rejection of a retroactive application of §641 of the DEFRA, that "[h]ad the district court said no more, there would have been no issue before

us" (A10). But the actual fact is that the District Court said "more" -- much more -- and it decided the very constitutional issue framed by the Government, on which issue the Government relied in its motion for summary judgment and in its opposition to the taxpayer's similar motion.

In a quite similar circumstance, in Equal Employment Opportunity Commission v. Allstate Insurance Company, 467 U.S. 1232, 1235-36 (1984), the dissent stated with respect to the similar argument made by the Solicitor General, namely, that the district court's invalidation of the Act therein involved "probably could have been -- and perhaps should have been -- on a statutory, not a constitutional, basis" as follows:

> But this is not the holding of the District Court. And the mere assertion now by the Solicitor General, and

> implicitly, by the Court, that the holding was in reality one of statutory construction, cannot change the fact that the District Court explicitly and unambiguously held the entire Act unconstitutional [emphasis to the word "unconstitutional" in the original].

In the instant case, the District Court held that -- retroactively applied -- §641 of the DEFRA was unconstitutional; the District Court held, in addition, that the provision was not intended to be retroactive.

Finally, with regard to the repeal of §1252 by Pub. L. No. 100-352, that law specifically states that the changes provided therein shall not affect any judgments or orders subject to appeal that were issued prior to the Act's effective date on September 25, 1988. The District Court's order herein was entered on August 8, 1986 -- more than two years prior to the repeal of §1252.

Further, the question presented by the instant petition will continue to have the same frequently recurrent significance to this Court's jurisdiction as it had prior to the repeal of §1252.[2/]

2/ Since, both before as well as after September 25, 1988, §1254(1) allowed, and hereafter will allow, any party to docket an appeal in the court of appeals and then immediately file a petition for certiorari before the rendition of the court of appeals decree, §1252 "should long ago have been recognized as largely superfluous in view of the expedited certiorari process embodied in §1254(1)." B. Boskey and E. Gressman, **The Supreme Court Bids Farewell To Mandatory Appeals**, 109 S.Ct. ixxxi, xcv (1988). The only difference as to district court judgments entered after September 25, 1988, with regard to whether such judgments "hold" an Act of Congress unconstitutional, will be that such determinations will be made in light of the discretionary and not the mandatory jurisdiction of the Court.

In conclusion, the Government has ignored all of the controlling precedents of this Court on §1252 and has presented in its Memorandum nothing of substance in opposition to the petition except its sole argument based upon an erroneous version of Christian Echoes and a distorted analysis of what the District Court decided herein.

As a consequence, the petitioner requests that the Court grant the petition for certiorari and summarily reverse the order of the Court of Appeals, upon the ground that the Court of Appeals from the beginning lacked jurisdiction over the Government's

appeal to it under §1252.

Respectfully submitted,

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